



TTAB

06-16-2003

U.S. Patent & TMO/c/TM Mail RcptDt. #73

2003011001 00175/00070

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

-----X	)	
I.O.B. REALTY INC.,	)	
	)	
Petitioner,	)	Cancellation No. 28,142
	)	
v.	)	
	)	
PATSY'S BRAND, INC.,	)	
	)	
Registrant.	)	
-----X	)	
	)	
PATSY'S BRAND, INC.,	)	
	)	
Petitioner,	)	Cancellation No. 29,614
	)	
v.	)	
	)	
I.O.B. REALTY INC.,	)	
	)	
Registrant.	)	
-----X	)	

**BRIEF OF PATSY'S BRAND, INC.**

This brief is being submitted on behalf of Patsy's Brand Inc. in the above-referenced consolidated cancellation proceedings in response to a May 12, 2003 communication from the interlocutory attorney inviting the parties to submit briefing concerning the substantive effect of the civil judgment (as modified by the court of appeals) upon these consolidated cancellation proceedings.

Initially, Patsy's Brand, Inc. notes that on September 4, 2002, judgment was entered in each of the above-referenced cancellation proceedings in favor of Patsy's Brand Inc., which consisted of the dismissal of Cancellation Proceeding No. 28,142 with prejudice, and the

granting of Patsy's Brand Inc.'s petition to cancel in Cancellation Proceeding No. 29,614. Neither judgment has been vacated.<sup>1</sup> By Order dated May 27, 2003 (copy attached), the Deputy Commissioner for Trademark Operations cancelled U.S. Trademark Registration Nos. 2,213,574 and 1,975,110 which were the subject of Cancellation Proceeding No. 29,614. Accordingly, no further action need be taken by the Board in connection with these proceedings. The matter is moot.

Nevertheless, Patsy's Brand is responding to the interlocutory attorney's invitation to the parties to submit briefing regarding the substantive effect of the judgment in the civil proceeding.

### **BACKGROUND**

On October 9, 1998, I.O.B. Realty Inc. ("I.O.B.") commenced a cancellation proceeding (No. 28,142) against Patsy's Brand Inc. seeking to cancel its U.S. Trademark Registration No. 1,874,789 for PATSY'S for sauces.

On October 25, 1999, Patsy's Brand, Inc. ("Patsy's Brand") commenced a cancellation proceeding (No. 29,614) against I.O.B. seeking to cancel its U.S. Trademark Registration Nos. 1,975,110 for PATSY'S and 2,213,574 for PATSY'S PIZZERIA, both for restaurant services.

The two cancellation proceedings subsequently were consolidated.

In October 1999, Patsy's Brand filed a civil action in the United States District Court for the Southern District of New York against I.O.B. and its principals. The District Court entered judgment in favor of Patsy's Brand on April 18, 2001. The judgment provided *inter alia* that Patsy's Brand "is the owner of all right, title and interest, including trademark rights, in and to

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<sup>1</sup> Thus, the interlocutory attorney's statement that "[u]pon consideration of the Briefs, the Board may enter judgment (or partial judgment) on behalf of either party, as appropriate," is unclear (May 12, 2003 Communication at p. 3).

the trademark PATSY'S for sauces and is the owner of a valid U.S. trademark registration for such mark, Registration No. 1,874,789" and "[t]hat Defendants shall withdraw their Petition for Cancellation No. 28,142." The judgment was affirmed by the United States Court of Appeals for the Second Circuit on January 16, 2003.

### **ARGUMENT**

#### *1. Cancellation Proceeding No. 28,142*

According to the judgment of the District Court, as affirmed by the Court of Appeals, Patsy's Brand is the exclusive owner of all rights to the trademark PATSY'S for sauces and all packaged food products. As grounds for its Petition To Cancel, I.O.B. alleged that there was a likelihood of confusion between Patsy's Brand's use of PATSY'S for sauces, and I.O.B.'s prior alleged use of PATSY'S for restaurant services. The District Court and Court of Appeals explicitly considered and rejected this argument. In addition, I.O.B. was ordered to withdraw Cancellation Proceeding No. 28,142. Therefore, there can be no doubt that the entry of judgment in Cancellation Proceeding No. 28,142 was in accordance with the judgment in the civil proceedings.

#### *2. Cancellation Proceeding No. 29,614*

Cancellation Proceeding No. 29,614 involved I.O.B.'s registrations for PATSY'S and PATSY'S PIZZERIA for restaurant services. On October 18, 2001, Patsy's Brand moved for judgment in its favor, which I.O.B. did not oppose, so judgment was entered in favor of Patsy's Brand Inc.

I.O.B. has shown no interest in these proceedings for many years now. It has failed to respond to orders to show cause since December 2000, or to oppose Patsy's Brand's motion for entry of judgment. I.O.B. has only feigned interest now that judgment has been entered against it, and both registrations have been cancelled. It is too late. I.O.B. has constantly changed lawyers in the civil litigation, and is now seeking to hide behind its change of lawyers and its alleged appearance *pro se* to avoid the consequences of its failure to respond to the orders of the Board. Indeed, although I.O.B. claims to be appearing *pro se* in these proceedings, its April 24, 2003 submission contains a footer which demonstrates that the document was authored by the law firm representing I.O.B. in the civil litigation, Torys LLP.<sup>2</sup> I.O.B. has offered no reason as to why its failure to respond to Patsy's Brand's motion for entry of judgment, or to the Board's various orders to show cause over the years should be excused.<sup>3</sup>

In any event, judgment should have been entered in favor of Patsy's Brand for several reasons. First, U.S. Registration No. 1,975,110 would have been and should be cancelled independently of these cancellation proceedings for Registrant's failure to comply with 15 U.S.C. § 1058. In addition, as the Second Circuit Court of Appeals held, Patsy's Italian Restaurant Inc., an affiliated company of Patsy's Brand, has the right to use the mark PATSY'S for restaurant services.<sup>4</sup> In contrast, I.O.B. does not have exclusive rights to the name PATSY'S

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<sup>2</sup> Torys LLP has refused to enter an appearance in these proceedings (see attached letter).

<sup>3</sup> I.O.B. never served Patsy's Brand with its submission of April 24, 2003 despite the "cc" on the letter.

<sup>4</sup> I.O.B.'s submission to the Board, dated April 24, 2003, contains misrepresentations as to the decision of the Court of Appeals. Contrary to I.O.B.'s representations, the Second Circuit did not determine that "I.O.B. is permitted to use 'Patsy's' for restaurant service." Instead, the Second Circuit held that the injunction was overbroad to the extent that it restricted the identification of I.O.B.'s pizzeria. The Second Circuit cautioned I.O.B. to refer to its business as "Patsy's Pizzeria" rather than "Patsy's" alone. Indeed, the Second Circuit's Order of March 27, 2003, referred only to use of "Patsy's Pizzeria" for a pizzeria. The Second Circuit certainly did not permit I.O.B. to use "Patsy's Pizzeria" as a trademark for pasta sauce or any other food product. Rather, the Court held that I.O.B. was permitted to indicate that pasta sauces it might sell in the future are sold by "Patsy's Pizzeria," as long as such indication of origin appears on the packaging in a small font, not as a trademark.

for restaurant services. Hence, the entry of judgment in Cancellation Proceeding No. 29,614 was in accordance with the judgment in the civil proceedings.

Respectfully,

Cooper & Dunham LLP

Dated: June 11, 2003

By: Robert T. Maldonado  
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Attorneys for Patsy's Brand, Inc.

I hereby certify that this paper is being deposited this date with the U.S. Postal Service as first class mail addressed to: Assistant Commissioner for Trademarks, 2900 Crystal Drive Arlington, Virginia 22202-3513.

Robert T. Maldonado  
Robert T. Maldonado

6/11/03  
Date

**CERTIFICATE OF SERVICE**

I hereby certify that a correct copy of the foregoing Brief of Patsy's Brand Inc. was served upon I.O.B. by First Class Mail this 14 day of June, 2003:

John Brecevic  
I.O.B. Realty Inc.  
2287-91 First Avenue  
New York, New York 10035

Robert T. Malden Jr.

TDC

U. S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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PATSY'S BRAND, INC.

v.

I.O.B. REALTY, INC.

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Cancellation No. 92029614

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Paul Grandinetti of Levy & Grandinetti for Patsy's Brand,  
Inc.

Norman H. Zivin of Cooper & Dunham, LLP for I.O.B. Realty,  
Inc.

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The petition of Patsy's Brand, Inc. having been granted  
on September 4, 2002, Registration Nos. 2,213,574 and  
1,975,110 are hereby cancelled.



Robert M. Anderson  
Deputy Commissioner for  
Trademark Operations

MAR 27 2003

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May 22, 2003

**BY FACSIMILE**

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**Re: I.O.B. Realty, Inc. v. Patsy's Brand, Inc./Patsy's Brand, Inc.  
v. I.O.B. Realty, Inc.—Cancellation Nos. 28142 and 29614  
(Consolidated)**

Dear Rob:

Thank you for your letter dated May 22, 2003. I.O.B. has chosen to appear pro se in the TTAB proceedings—an election that the TTAB afforded it (see Order dated December 1, 2000.) Accordingly, Torys does not plan to enter an appearance.

Sincerely,



Thomas I. Sheridan, III

TIS/lsm